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IN THE

Supreme Court of the United States

CLIFFORD B. MEACHAM, *ET AL.*,
Petitioners,

v.

KNOLLS ATOMIC POWER LABORATORY, *ET AL.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the
Second Circuit

BRIEF OF AMICUS CURIAE NATIONAL SCHOOL BOARDS ASSOCIATION IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST OF AMICUS CURIAE

The National School Boards Association ("NSBA") is a not-for-profit federation of state school board associations from throughout the United States, the Hawaii State Board of Education and the Board of Education of the U.S. Virgin Islands. NSBA and the members of its federation together currently represent the over 95,000 school-board members who govern some 14,000 local school districts employing almost 6.4 million people.[1]

NSBA's mission is to foster excellence and equity in public education through school-board leadership. As part of its mission, NSBA supports the reasonable application of anti-discrimination laws that balance the rights of public school employees with the educational and fiscal challenges facing public schools.

In this case, NSBA seeks to provide the Court with concrete examples of employment decisions faced by public school districts in which a rule that placed the burden on employers to prove a reasonable factor other than age ("RFOA") in a suit brought under the Age Discrimination in Employment Act, 29 U.S.C. § 623 ("ADEA"), would hamper school districts' ability to accomplish their educational mission. School districts employ a variety of sensible employment criteria that are designed to improve educational achievement. When such a RFOA may have a disproportionate impact on workers over 40 years of

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[1] Pursuant to Supreme Court Rule 37.6, we note that no part of this brief was authored by counsel for any party, and no person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. This brief is filed with the written consent of all parties pursuant to Rule 37.3(a); the requisite consent letters have been filed with the Clerk of this Court.

age, school districts should not be required to create a record that they have eliminated every possibility of age discrimination.

SUMMARY OF ARGUMENT

The Second Circuit correctly concluded that the "business necessity" test is irrelevant to ADEA analysis, and that the ADEA does not place on employers the burden of demonstrating that common and necessary employment criteria are reasonable. For our nation's public school districts it is particularly important that employers not bear these burdens. To shift the burden to school districts would undermine a variety of employment practices critical to the success of America's schools.

Public education today embraces challenges that require schools to hire, reward, retain and effectively deploy the teachers and administrators with the skills needed to best promote learning. Schools today must prepare students to compete in a global marketplace. Moreover, they serve an increasingly diverse student population, including many students from low-income or immigrant households and many who may not speak English as their first language. Schools must also serve the wide variety of special needs presented by children with disabilities pursuant to the Individuals with Disabilities Education Act. Finally, schools must educate all children to a higher level in an environment characterized by rapid technological change.

The employment practices necessary to meet these challenges sometimes may disproportionately affect older employees. Some such clearly appropriate employment criteria focus on particular skills and training and thus may favor more recent education-school graduates. For example, the skills necessary to educate students who do not speak English as their first language are more apt to be provided in

teacher training programs today than was true in the past. Other policies that seek to place the best teachers in the schools where they are most needed may disproportionately affect older employees because of the expertise that they have gained through experience. School districts today that are undertaking reorganizations to improve academic achievement at a particular school, or district-wide; are experimenting with incentive pay programs to attract and retain the best personnel where they are most needed; or are required by shrinking budgets to employ a reduction-in-force, all require flexibility in being able to adopt reasonable employment practices to attract and retain the best educators.

Placing the burden of proof in disparate impact cases under the ADEA on school districts to prove that every employment criteria they use is reasonable would impose significant additional costs on school districts and deter necessary, appropriate and sometimes legally mandated reforms and innovations. For these reasons, NSBA urges the Court to affirm the decision below.

ARGUMENT

I. AMERICAN PUBLIC SCHOOLS FACE UNPRECEDENTED CHALLENGES IN REACHING IMPORTANT EDUCATIONAL GOALS.

Our nation's public schools aspire to prepare American citizens for success in an increasingly competitive global marketplace. Such preparation today requires elementary and secondary schools to equip students with skills to succeed in college or other post-secondary education. To meet the challenges of the 21st Century, our public schools are raising the bar for all students. At the same time, public school systems also face unprecedented challenges ranging from the diverse educational and

linguistic needs of their students to the rapidly evolving nature of the skills that students must master. Public schools today are intensely focused on providing students from all backgrounds with an education that will prepare them to compete in a global market. In addition, our schools ensure that children with special needs receive a free appropriate public education through individualized education programs. In this environment, the success of American public schools depends in significant part on the ability to efficiently implement reasonable employment policies and practices.

School districts' efforts to raise the bar for all students have been given additional urgency by requirements of federal law. In particular, the No Child Left Behind Act of 2001, 20 U.S.C. § 6301 *et seq.* ("NCLB"), not only requires annual testing of all students with the goal of 100 percent proficiency by 2014, but it also imposes sanctions for certain schools and school districts, including a variety of employment-related measures that require, for example, replacing staff in such schools. In addition, NCLB requires public school teachers to be or become "highly qualified" and requires that qualified and experienced teachers be fairly distributed within each school district. And the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*, requires individualized educational programs for disabled students that can require school districts to employ teachers and staff with a wide range of specialized training.

Part of the impetus for NCLB was the widespread belief that public schools today must do more than ever before. The United States government, American businesses, and our public school districts themselves all recognize that the marketplace and workplace are now global, and the ability to compete internationally requires that students be prepared to

succeed in college. *See, e.g.*, NCMST, *Before It's Too Late: A Report to the Nation from The National Commission on Mathematics and Science Teaching for the 21st Century* 11–13 (Sept. 2000), *available at* http://www.ed.gov/inits/Math/glenn/report.pdf. The challenge is substantial, especially in preparing all students to succeed at the level required in mathematics and science.[2]

Even as the goals of public education are raised, a number of unprecedented challenges also are arising. First, public schools face a rapidly changing student population. The number of minority and immigrant students grows annually. An increasing percentage of American students are not native English speakers. Therefore, teachers must have specialized knowledge and training to teach increasing numbers of students who are English language learners ("ELLs"). Many public schools also serve a growing number of children from low-income families, and some of these students have particular educational needs associated with poverty.

Furthermore, even as standards are raised and educational needs increase, the areas that a sound public education must address continue to expand. As a number of schools and school districts have already recognized, technology has become increasingly important in the workplace, and as such it is vital that schools incorporate computer-based and computer-related learning into their curriculum.

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[2] In a 2006 study that compared 57 countries, 15-year-old students in the United States performed below international averages in science and mathematics literacy. Institute of Educ. Sciences, U.S. Dep't of Educ., *Highlights from PISA 2006: Performance of U.S. 15-Year-Old Students in Science and Mathematics Literacy in an International Context* iii–iv (December 2007), *available at* http://nces.ed.gov/pubs2008/2008016.pdf.

American schools and school districts, therefore, must retain the ability to hire and retain teachers and administrators who have the complex mix of skills necessary to cope with this unprecedented combination of challenges. They should not be hamstrung by a requirement that they be prepared to defend the business necessity or reasonableness of routine employment decisions that for a variety of reasons might have a disparate impact on older workers.

II. THE SUCCESS OF OUR NATION'S PUBLIC SCHOOLS DEPENDS ON FLEXIBLE POLICIES AND PRACTICES FOR HIRING AND RETAINING SUPERIOR TEACHERS, ADMINISTRATORS, AND STAFF, AND SOME OF THESE, WHILE CLEARLY NECESSARY, REASONABLE, AND UNEXCEPTIONABLE, MAY DISPROPORTIONATELY IMPACT OLDER EMPLOYEES.

Highly effective teachers and administrators are central to adequately prepare students for college and for competition in the global marketplace.[3] Both hiring employees who possess the skills critical to promoting educational success and making sure the most effective teachers and administrators are working in schools where the needs are greatest often require reasonable practices that may disproportionately affect older workers. Such situations

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[3] Research shows that students who are assigned to effective teachers have significantly higher achievement and gains in achievement than those who are assigned to ineffective teachers. *See generally* W.L. Sanders & J.C. Rivers, *Cumulative and Residual Effects of Teachers on Future Student Academic Achievement* (Knoxville: Univ. of Tenn. Value-Added Research and Assessment Center 1996), *available at* http://www.heartland.org/pdf/21803a.pdf.

include reorganizations, either educationally driven or legally mandated; teacher reassignments; incentive pay systems designed to reward the most effective teachers; early retirement programs; and reductions in force.

A. Policies Requiring the Training and Skills Required of Highly Effective Teachers and Administrators Today Are Likely to Have Incidental Adverse Effects on Older Employees.

For several reasons, some policies designed to target the teachers and administrators best suited to meet current educational challenges may disproportionately affect older workers.

1. Relatively recent graduates of education schools may be more likely to have adequate training to teach the growing numbers of public school students with special needs. Education programs that teach the specific skills and techniques unique to the needs of low-income, ELL, and mobile students best prepare teachers to help those growing groups of students.[4]

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[4] *See* SEF, *A New Majority: Low Income Students in the South's Public Schools*, 8–9 (2007), *available at* http://www.sefatl.org/pdf/A%20New%20Majority%20ReportFinal.pdf (noting recent dramatic rise in poor students in the South and other regions of the United States); NCES, *English Language Learner Students in U.S. Public Schools: 1994 and 2000* (Aug. 2004), *available at* http://nces.ed.gov/pubs2004/2004035.pdf (documenting recent rise in the number of ELL students in public schools since the 1990s); Russell W. Rumberger & Katherine A. Larson, *Student Mobility and the Increased Risk of High School Dropout*, 107 Am. J. Educ. 1, 1–2 (Nov. 1998) (describing recent increase in student mobility).

For example, today school districts need to hire more teachers trained to deal with the rapid increases in the number of ELL students in American classrooms. Currently, although 41 percent of teachers in the United States have had ELL students in their classrooms, only 13 percent of those teachers reported receiving any instruction or professional development on the education of ELLs. Sandy Watson *et al.*, *English Language Learner Representation in Teacher Education Textbooks: A Null Curriculum?*, 126 Educ. 148, 148 (Fall 2005). For teachers to be prepared to teach ELL students, they must receive systematic training on practical issues concerning ELLs. *See id.* at 148–49. While experienced teachers have opportunities to undergo such training, many elect not to do so.

Second, recent graduates may be more likely to have the necessary skills to teach technology and to teach with technology. It is vital that schools incorporate computer-based and computer-related learning into their curriculum. *See* California Dep't of Educ., *Connect, Compute, and Compete: The Report of the California Education Technology Task Force* 12 (1996). As a result, several states have begun to require school districts to introduce standards that measure and ensure certain technological proficiencies for teachers. *See, e.g.*, South Carolina Dep't of Educ., *Teacher Technology Proficiency (Proviso '.25)*, http://ed.sc.gov/agency/offices/tech/teachprofprov/index.html; Coronado Unified School District, *Staff Development Training: Teacher Proficiency Using Technology*, http://www.coronado.k12.ca.us/technology/teacherprof.htm.

Third, finding the best school administrators to meet contemporary educational challenges may also require reasonable and objective job criteria that could disproportionately affect older workers. School principals, for example, play an important role in

teaching and learning. *See* NGA Center for Best Practices, *Improving Teaching and Learning by Improving School Leadership* 1 (Sept. 12, 2003), http://www.nga.org/cda/files/091203LEADERSHIP.pdf ("*Improving Teaching and Learning*"). Superintendents are increasingly aware, however, that many principals today are not adequately trained to handle the "changing nature of the principalship." *Id.*; *see also* IEL, *Leadership for Student Learning: Reinventing the Principalship* 2 (October 2000), *available at* http://www.iel.org/programs/21st/reports/princpal.pdf. Specifically, school principals, who were traditionally expected to perform primarily managerial and political roles, are now being called upon to serve as entrepreneurs, organizers, and instructional leaders, as well. *Improving Teaching and Learning* at 2.

2. NCLB required school districts, by the 2005–06 school year, to have "highly qualified teachers," as defined by the Act, teaching all core academic subjects in each public elementary school and secondary school. 20 U.S.C. § 6319(a)(2)(A). NCLB itself set out certain criteria by which states were to define "highly qualified" teachers. Although there are slightly different requirements for new and experienced teachers, in general NCLB requires a teacher's qualifications to be assessed under three essential criteria: whether a teacher has obtained a bachelor's degree or better in the subject taught; whether the teacher has obtained full state teacher certification; and whether the teacher has otherwise demonstrated knowledge in the subjects taught. 20 U.S.C. § 7801(23).

Under NCLB, most new teachers coming out of teacher education programs should be deemed "highly qualified." NCLB allows states to adopt higher standards or more demanding teacher qualifications than the federal ones, but states may not

adopt standards below those established in NCLB. 20 U.S.C. § 6319(a)(2). Some states have benefited from this flexibility. Recent research has shown that, to be effective, teachers must understand the information they are expected to teach (which NCLB emphasizes) and must also be comfortable with a range of pedagogical techniques for conveying that information to students. Linda Darling-Hammond, *Access to Quality Teaching: An Analysis of Inequalities in California's Public Schools*, 43 Santa Clara L. Rev. 1045, 1054 (2003). Additionally, teachers must be able to adapt to the changing needs of public school populations, including developing populations of immigrant, special needs and ELL students. *Id.* at 1059. States like California, Nevada, and Illinois have adopted teacher-qualification standards that incorporate these critical skills. *See, e.g.*, Cal. Educ. Code § 44259; Ill. Admin. Code tit. 25 § 25.25; Nev. Admin. Code § 391 *et seq.*

While school administrators have always sought to ensure that the teachers in their district had the necessary skills to meet students' needs, these new NCLB standards for highly-qualified teachers give the task a particular urgency. Since 2001, school administrators have had to take a hard look at their workforces to determine whether those teachers already in the classroom satisfy the new requirements. Inevitably, some teachers do not have the necessary background or experience to meet the NCLB-based standards. When that occurs, administrators face two options. They can either replace the current teacher with another teacher, who may well be newly-credentialed and thus already-trained, or they can provide additional training to the current teacher. The choice may turn on the dual pressures of time and budget.

Time pressure comes in two main forms. First, students' needs are immediate and cannot go unmet

while teachers are being brought up to speed with training. According to the National Center for Educational Statistics at the Department of Education, at the 2000 census, the average school year, nationwide, was only 180 days, and the average school day lasted less than seven hours. *Average Length of School Year and Average Length of School Day, by Selected Characteristics: United States, 2001–02*, http://nces.ed.gov/surveys/pss/tables/table_15.asp (last visited Mar. 20, 2008). For the average American student, high school has only 720 days of instruction. Second, out of the 180 days in a given school year, typically only three to five days will be allocated for teacher training.[5] School administrators recognize that there are limits to the training that can be provided in such a restricted timeframe.

While additional training can be completed, it often can only be completed at the expense of already-

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[5] In 33 states, public school districts and their employees establish the contours of the employment relationship through collective bargaining agreements. *See* Educ. Comm'n of the States, *State Collective Bargaining Policies for Teachers*, StateNotes (Jun. 2002), http://www.ecs.org/clearinhouse/37/48/3748.pdf. Teachers in Montgomery County, Maryland have only three scheduled training days per school year; in Chicago, Illinois the collective bargaining agreement in place when NCLB was enacted provided for five days of training; Baltimore, Maryland requires teachers to attend 10 days of training annually, but this includes both summer training and training that occurs during the school year. *See* Agreement Between Montgomery County Educ. Assoc. & Bd. of Educ. of Montgomery County 35 (2005–2007); Agreement Between the Bd. of Educ. of City of Chi. & Chi. Tchrs. Union 150–51 (1999–2003); Agreement Between the Balt. Tchrs. Union & Balt. City Bd. of Sch. Comm'rs 29 (2005–2007) (all *available at* U.S. Dep't of Labor, Collective Bargaining Agreements, http://www.dol.gov/esa/regs/compliance/olms/cba/Cbau_aabz.htm).

limited classroom time or at an additional financial cost to the district. School administrators, however, hesitate to cut into instructional time, and, depending on a school district's budget, it may not be financially feasible to provide unqualified teachers with additional training. Increased training would require increased funding at a time when school districts are already planning to cut back in all areas of spending because of the economic slump. Nancy Zuckerbrod, *School Officials Expecting Cuts Due to Downturn in Economy*, San Diego Union Trib., Feb. 11, 2008.

3. At the same time, school districts increasingly recognize the importance of having a fair distribution of experienced teachers in all schools. Moreover, NCLB expressly requires that low-income and minority students not be taught by disproportionately under-qualified or inexperienced faculties. *See* 20 U.S.C. § 6311(b)(8)(c). Despite this mandate, schools nationwide with high proportions of low-income or minority students, *are* disproportionately taught by teachers with fewer than three years of experience.[6] Not only are students adversely affected by this pattern, but often other teachers may be as well: Experienced teachers are important in providing mentoring and leadership to less experienced teachers in a school. Charlotte Danielson, *Mentoring Beginning Teachers: The Case for Mentoring*, 6 Teaching and Change 251 (1999).

Traditional school employment practices reward seniority, by among other things, providing greater rights for experienced teachers to transfer within a

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[6] Heather G. Peske and Kati Haycock, *Teaching Inequality: How Poor and Minority Students Are Shortchanged on Teacher Quality, Education Trust* (June 2006), *available at* http://www2.edtrust.org/NR/rdonlyres/010DBD9F-CED8-4D2B-9E0D-91B446746ED3/0/TQReportJune2006.pdf.

school district to the school of their choice.[7] Experienced teachers, however, tend to transfer away from schools with higher proportions of low-achieving students. Eric A. Hanushek *et al.*, *Why Public Schools Lose Teachers*, 39 J. Hum. Res. 326, 337 (2004). While districts are starting to implement incentive pay programs that sometimes seek to keep experienced teachers in schools with low-achieving students, *see infra*, some districts have found that such programs are not sufficient, in and of themselves, to maintain an experienced teaching staff at their most challenged schools. Eric A. Hanushek & Steven G. Rivkin, *Pay, Working Conditions, and Teacher Quality*, 17 The Future of Children 69, 75–76 (2007) (finding that more experienced teachers often transfer to schools with lower salaries but better working conditions).[8] In these kinds of circumstances, a district may reasonably adopt a policy requiring some experienced teachers to transfer to a needier school. Such a policy would be reasonably based on improving student achievement—and would also be likely to disproportionately affect older employees.

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[7] Jessica Levin, Jennifer Mulhern, and Joan Schunck, *Unintended Consequences: The Case for Reforming the Staffing Rules in Urban Teachers Union Contracts*, The New Teacher Project 8–9 (2005) *available at* http://www.ocs.org/html/offsite.asp?document=http%3A%2F%2Fwww%2Etntp%2Eorg%2Fnewreport%2FTNTP%2520Unintended%2520Consequences%2Epdf.

[8] *See also*, Hanushek *et al.*, *Why Public Schools Lose Teachers*, 39 J. Hum. Res. at 351 (finding that a substantial salary premium is required to overcome the effects on teacher turnover of high concentrations of low-achieving, minority, and low-income students in large urban schools: for less experienced females, the salary differential is 25–40 percent).

B. School Districts Undergoing Reorganizations Require Flexibility to Adopt Policies that May Disproportionately Affect Older Employees.

School districts across the country are commonly reorganizing to meet today's educational challenges. A district's ability to implement reasonable methods of reorganization requires sufficient flexibility in hiring and retention policies for administrators and teachers. Such flexibility allows districts to pursue their educational goals, while also ensuring compliance with the accountability standards embedded in state and federal law, including NCLB. In these situations, school districts should not be forced to make personnel decisions that are driven by a fear of litigation under the ADEA.

1. The need for flexibility in personnel policies is particularly acute when a new superintendent enters a school district. In 2007, mean tenure for superintendents was 5.5 years. *See* Amy Vogt, *AASA Releases Study of the American School Superintendency* (Sept. 24, 2007), http://www.aasa.org/newsroom/pressdetail.cfm?ItemNumber=9401, (citing Thomas E. Glass and Louis A. Franceschini, Amer. Assoc. of Sch. Administrators, *The State of American School Superintendency: A Mid-Decade Study* (Rowman & Littlefield Education 2007)). School boards often choose to replace a superintendent in hopes of stimulating academic improvement. Typically, new superintendents develop and implement their own plans for improvement, which can (and often do) include restructuring the entire administration of a school district. In the course of this restructuring, an entire level of management in the school district may even be removed—a type of change that may be expected to disproportionately affect older workers.

An example of this type of reorganization can be

seen in the public schools of New York City, where Mayor Michael Bloomberg assumed control of the public schools in 2003, and launched an initiative known as Children First. As part of the initiative, Mayor Bloomberg hired a new Chancellor, reorganized the city's 32 community school districts into 10 instructional divisions and replaced 40 district superintendents with 10 regional superintendents. *See* David M. Herszenhorn, *Education Dept. Hires 108 Local Supervisors*, N.Y. Times, Apr. 29, 2003; Abby Goodnough, *Vision for the Schools: Overview; Mayor Sets Plan for Tight Control Over City Schools*, N.Y. Times, Jan. 16, 2003. Other examples of recent reorganizations include the District of Columbia and Charlotte, North Carolina. In the District of Columbia, Mayor Adrian Fenty appointed Michelle Rhee as the Chancellor in 2007, and in January of 2008, the D.C. Council granted Ms. Rhee more power to fire underperforming employees. *See* Gary Emerling, *Rhee Fires 98 School Administrative Workers*, Wash. Times, Mar. 8, 2008. In Charlotte-Mecklenburg, a new superintendent reorganized the district in 2007, moving many district administrators from a single central office to new regional offices closer to the individual schools. *See* Steve Lyttle, *Effort to Improve Student Academics*, Char. Observer, May 13, 2007. While all of these reorganizations have been designed to improve student achievement, the steps necessary to achieve them may adversely affect older employees.

2. Even absent a full scale, district-wide reorganization, school administrators seeking to address below-satisfactory student performance need the flexibility to make reasonable personnel decisions and to hire and retain the best teachers without assuming the burden of proof in a lawsuit. Districts may require experienced teachers to act as mentors for new teachers, or as discussed above, may seek to transfer experienced teachers to a particular school

or class with low-achieving students. School districts pursuing such policies to improve student achievement should not be stifled by having to make a record that will support their necessary and reasonable decisionmaking if the district later faces a discrimination claim that older teachers were disproportionately impacted.

In fact, federal law underscores the need for flexibility in hiring and retention decisions related to school-level reorganizations. NCLB, for example, requires school districts to restructure schools that fail to meet their accountability goals for several years. *See* 20 U.S.C. § 6316(b)(7)(C), (b)(8)(B) (calling for the replacement of "the school staff who are relevant to the failure to make adequate yearly progress" after two years of failure, and any other "major restructuring of the school's governance arrangement" after three years). Restructuring in compliance with NCLB often requires the termination of all teachers within a particular school and a requirement that they reapply for their jobs.

In turn, when school districts consider these teachers upon reapplication, they should—in order to improve on the NCLB accountability goals—hire back only the most effective teachers. Districts consider factors such as training and education, motivation, energy, and experience. There is at least the possibility that many of the applicants most qualified under these considerations would be under the age of 40. In such a case, older workers may be adversely affected, but the school districts' decisions would indeed be reasonably based on teacher qualifications.

An example of such a reorganization took place within the Chattanooga, Tennessee school district. *See* NCTAF, *Reducing the Achievement Gap Through District/Union Collaboration: The Tale of Two School Districts*, National Comm'n on Teaching

and America's Future 11–21. In 1996, in an effort to improve a failing school system highlighted by some of the lowest achieving schools in the state, the Chattanooga school district merged with the school district in the surrounding county (Hamilton County). *See id.* at 11. A new superintendent was hired in 1997 to oversee the merger, and he faced countless organizational issues, one of which was hiring and retention of effective teachers. *See id.* at 11–12.

In 2000, the teachers' union and the newly merged district agreed on a plan to reconstitute the faculties at many of the district's lowest achieving schools. *See id.* at 14. Rather than firing teachers, the agreement mandated that any teacher who was asked to leave a failing school would be assured a place at another school within the district. There is a strong possibility that a larger proportion of older teachers may have been affected by these transfers, however, especially as the district looked to place the most effective teachers at its lowest performing schools. *See id.*

As a result of the reorganization, the Hamilton County school district's overall achievement has improved markedly. *See id.* at 22–23. Despite this tremendous improvement, a change in the burden on proof on RFOA may make another superintendent think twice about this same decision in the future.[9]

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[9] Unwanted teacher transfers have been the basis of ADEA claims in the past. *See, e.g., Kodl* v. *Bd. of Educ. Sch. Dist. 45, Villa Park*, 490 F.3d 558 (7th Cir. 2007); *Galabya* v. *New York City Bd. of Educ.*, 202 F.3d 636 (2d Cir. 2000); *Sanchez* v. *Denver Pub. Schs.*, 164 F.3d 527 (10th Cir. 1998).

C. Incentive Pay Systems May Be Needed to Recruit and Retain Effective Teachers.

In their attempts to recruit, retain, and develop the best teachers, several states and districts are changing the way teacher compensation is calculated to reward effective teachers and practices. While many new compensation policies offer promising results for students,[10] they may also have a disparate impact on older teachers. *See* Hanushek *et al.*, *Why Public Schools Lose Teachers*, 39 J. Hum. Res. at 343 (finding greatest positive retention effect of salary increases on less-experienced teachers).

Under a traditional pay scale, teachers earn more based on years of teaching experience accumulated and graduate credits earned. There are two principal shortcomings of this system. First, these factors are not accurate predictors of successful teachers. Studies have generally failed to identify a positive link between advanced degrees unconnected to the

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[10] *See* Dan Goldhaber, Center for Amer. Progress, *Teacher Pay Reforms: The Political Implications of Recent Research* (2006), *available at* http://www.americanprogress.org/issues/2006/12/pdf/teacher_pay_report.pdf; Lewis C. Solomon *et al.*, NIET, *The Effectiveness of the Teacher Advancement Program* 2 (Revised Apr. 2007), *available at* http://www.talentedteachers.org/pubterms.taf?file=http://www.talentedteachers.org/pubs/effective_tap07_full.pdf; Matthew G. Springer & Michael J. Podgursky, NCPI, *Teacher Performance Pay: A Review* 35 (2006), *available at* http://www.performanceincentives.org/data/files/news/PapersNews/Podgursky_and_Springer_2006_Revised.pdf; David N. Figlio & Lawrence W. Kenny, *Individual Teacher Incentives and Student Performance* 3 (Nat'l Bureau of Econ. Res., Working Paper No. W12627, 2006), *available at* http://ssrn.com/abstract=938953.

subject matter taught and teacher effectiveness.[11] And while teachers tend to make significant improvements in their first several years of teaching, the benefits of additional years of experience taper off thereafter.[12] Second, the traditional pay scale fails to exploit the market incentives that operate in other professions to provide a premium to people who fill positions in high demand, possess skills in short supply, or perform exceptionally well. *See, e.g.*, U.S. Dep't of Educ., *Teacher Shortage Areas Nationwide Listing 1990–91 through 2007–08* (Mar. 2008), *available at* http://www.ed.gov/about/offices/list/ope/pol/tsa.pdf (finding, in 2007–08, that 43 states and the District of Columbia are experiencing math teacher shortages, 41 states are experiencing science teacher shortages, and 46 states and the District of Columbia are experiencing special-education teacher shortages).

Although teachers' unions have conventionally

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[11] *See* C.T. Clotfelter *et al.*, *Teacher Credentials and Student Achievement in High School: A Cross-Subject Analysis with Student Fixed Effects* 27 (Urban Inst., Working Paper No. 11, 2007); Dan Goldhaber & Emily Anthony, *Can Teacher Quality Be Effectively Assessed? National Board Certification as a Signal of Effective Teaching*, 81 Rev. Econ. & Stat. 134, 12 (2007); Eric A. Hanushek *et al.*, *The Market for Teacher Quality* 19–20 (Nat'l Bureau of Econ. Res., Working Paper No. 11154, Feb. 2005), *available at* http://www.nber.org/papers/w11154.

[12] *See* Clotfelter *et al.*, *Teacher Credentials and Student Achievement in High School: A Cross-Subject Analysis with Student Fixed Effects* at 19; Eric A. Hanushek *et al.*, *The Market for Teacher Quality* 20–21 (Nat'l Bureau of Econ. Res., Working Paper No. 11154, Feb. 2005), *available at* http://www.nber.org/papers/w11154; D.N. Harris & T.R. Sass, *Teacher Training, Teacher Quality and Student Achievement* 19 (Urban Inst., Working Paper No. 3, Mar. 2007).

opposed merit pay, the urgent need to improve student outcomes in the face of increasing challenges has brought unions and districts to the bargaining table with a renewed focus on student achievement.[13] Although plans that rely solely on test scores or subjective evaluations and those that force teachers to compete for bonuses remain controversial and largely unpopular, *see* Terrence Stutz, *Many Texas School Districts Reject Merit Pay for Teachers*, Dallas Morning News, Mar. 10, 2008 (noting teacher opposition to such plans); *Merit Pay's Unintended Lesson*, St. Petersburg Times, Mar. 13, 2008 (same), some unions and school districts are successfully negotiating agreements that reward student gains, meaningful professional development and leadership, and teaching in hard-to-staff positions.

Incentive plans are garnering increasing support—including from unions and the federal government—because of their potential to help schools meet their educational objectives for students. *See, e.g.*, 20 U.S.C. § 6613(c)(12) (NCLB provision allowing funds to be used as bonuses for teachers in high-need academic subjects and high-poverty schools and districts); Dep'ts of Labor, Health and Hum. Svcs., and Educ. and Related Agencies Appropriations Act 2006, Title V, Part D, Pub. L. No. 109-149, 119 Stat.

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[13] Indeed, local affiliates are working with school districts to shape the details of alternative pay systems even while their national leadership remains largely critical. Press Release, UFT, UFT: DOE "Misguided" to Seek to Use Test Scores to Judge Teachers (Jan. 21, 2008), *available at* http://www.uft.org/news/issues/press/testscores_guide_teachers/; NEA, *NEA Handbook* 278, http://www.nea.org/handbook/images/resolutions.pdf, accessed Mar. 20, 2008. The American Federation of Teachers has taken a more moderate position. "Professional Compensation," http://www.aft.org/topics/teacher quality/comp.htm (last visited Mar. 20, 2008).

2833 ($100 million Teacher Incentive Fund assisting states and school districts in developing performance-based teacher compensation systems). Some states have even passed legislation funding and regulating alternative compensation plans. *See* Fla. Stat. § 1012.225; Minn. Stat. § 179A.01 *et seq.*; Tex. Educ. Code Ann. § 21.701 *et seq.* These changes will benefit teachers, but not all to the same extent.

For example, in Denver, the Denver Classroom Teachers Association and the Denver Public Schools agreed to supplement the established lock-step salary schedule with a new system that rewards professional development, National Board Certification,[14] satisfactory evaluations, student growth on standardized tests, and working in hard-to-serve schools or hard-to-staff positions. Voters approved a tax increase to fund the program. New teachers are automatically enrolled, while veteran teachers may choose whether to join. Denver Pub. Schs., *Professional Compensation System for Teachers*, http://denverprocomp.org/stories/storyReader$33 (last visited Mar. 20, 2008). The four-year pilot study in 16 Denver schools found a positive correlation between program participation and student achievement, prompting full-scale implementation. *See* CTAC, *Catalyst for Change: Pay for Performance in Denver, Final Report* (Jan. 2004), *available at* http://www.ctacusa.com/denver-vol3-final.pdf.

Another Colorado school district, Eagle County, has dispensed with the lock-step salary schedule altogether and adopted the Teacher Advancement Program ("TAP") developed by the Milken Family Foun-

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[14] National Board Certification is a voluntary credential awarded to teachers who excel on both an assessment of knowledge of their subject area and a performance-based assessment, which includes a portfolio of student work samples, assignments, videotaped lessons, and analysis of one's teaching.

dation. The program rewards mentoring, knowledge and skills, and student growth on standardized tests. An early study concluded that students of TAP teachers and schools made greater gains on standardized tests than students of teachers and schools without the program. *See* Solomon *et al.*, *The Effectiveness of the Teacher Advancement Program* at 2.

In Minnesota, the state legislature enacted Q Comp in 2005, and last year approved $76 million to fund the program. Q Comp is a voluntary program based on TAP, but individual districts negotiate with local unions to develop the details of their own plans. The programs must include five components: career ladder/advancement options whereby teachers can take on increased responsibilities and mentoring roles, job-embedded professional development, teacher evaluations performed by multiple people and aligned with state objectives, performance pay tied to student achievement, and an alternative salary schedule. As of this academic year, 39 school districts and 21 charter schools had approved plans in place. Minn. Dep't of Ed., *Quality Compensation for Teachers (Q Comp)*, http://education.state.mn.us/MDE/Teacher_Support/QComp/index.html (last visited March 20, 2008).

Because incentive pay systems are relatively new, the effects on different age groups are still uncertain. Although the plans are facially age-neutral, they disrupt—and in some cases replace—a system whereby teachers were rewarded simply for remaining in the classroom, receiving automatic raises as they aged. Bonuses for specified degrees or skills might also result in a skewed distribution of awards. But neither of these effects are the result of age discrimination, and school districts should not be discouraged from experimenting with incentive compensation programs for fear of having to prove

their business necessity or reasonableness in potentially long and expensive litigation.

D. Early Retirement Programs Help School Districts Ensure a Highly-Qualified Teaching Staff

School districts' early retirement programs typically encourage employees who have attained a certain age or a requisite number of years' service to retire earlier than they otherwise might. School districts offer a variety of financial incentives, including lump sum payments to those who retire early, additional yearly stipends on top of any earned retirement benefits, or bridge health benefits to those who retire before they are eligible for Medicare. *See* Diane M. Juffras, *Early Retirement Incentive Programs: Are they Legal for North Carolina Public Employers?*, 33 Pub. Emp. Law Bull. 1 (2006) http://ncinfo.iog.unc.edu/pubs/electronicversions/pdfs/pelb33.pdf.

School districts have traditionally used early retirement programs to help ease budgetary crises. Under typical early retirement programs, employees with enough seniority to benefit from the programs would generally earn salaries near the apex of the district's pay scale. When those employees take advantage of the early retirement programs and exit the workforce, they release district funds for other uses.

In addition, where teachers fail to meet the highly qualified requirements of NCLB, as discussed previously, school administrators may determine that they will be unable to retrain some teachers, because of time or budgetary constraints. Those teachers may have been with the school district for a significant period of time. In those cases, early retirement programs provide a graceful option for exit by employees who would require extensive and expensive

training in order to bring their skills into line with a district's needs. Early retirement programs thus also create space for school districts to hire newly trained and highly qualified teachers into the district's workforce.

To encourage employees to retire sooner, rather than later, these plans often offer the best benefits to the youngest eligible employees, with benefits decreasing or ceasing over time or upon attainment of some particular age. Because the benefits provided by early retirement programs typically diminish as employees age, school districts' programs have been subject to numerous ADEA lawsuits, both by the EEOC and by private parties. The cases have been brought both as disparate treatment and disparate impact cases. *Compare O'Brien* v. *Bd. of Educ. of Deer Park Union Free Sch. Dist.*, 92 F. Supp. 2d 110 (E.D.N.Y. 2000) (holding that early retirement program's payment plan based on accumulated sick leave, which diminished benefits during plaintiffs' window of eligibility, was disparate treatment under the ADEA) *with EEOC* v. *Hickman Mills Consol. Sch. Dist. No. 1*, 99 F. Supp. 2d 1070 (W.D. Mo. 2000) (holding, under alternate theory of liability, that plan that reduced benefits as years of eligibility passed created disparate impact on older workers and violated ADEA).

In 1998, the EEOC instituted the first of hundreds of ADEA lawsuits nationwide that targeted school districts with early retirement programs. The majority of the lawsuits addressed programs that provided "bridge" medical benefits for early retirees. Under the plans, school districts would provide medical benefits for early retirees until they turned 65 or became eligible for Medicare. The EEOC eventually abandoned its theory that the bridge benefits violated the ADEA. Congress, however, was so troubled by the ADEA lawsuits against the school districts

that, in the Pension Protection Act of 2006, Pub. L. 109-280, 120 Stat. 780 (codified at 29 U.S.C. § 623 *et seq.*), it created an express ADEA exemption for certain school-district sponsored early retirement programs, including those that provided bridge medical benefits, *id.* (codified at 29 U.S.C. § 623(*l*)(1)).

Workforce and ADEA lawsuits over early retirement programs, however, continue to be of concern for school districts nationwide. The EEOC did not abandon all of its ADEA lawsuits against school districts for their early retirement programs, only those based on the bridge-benefits programs. *See* Amy Hetzner, *Cases Against Districts Dropped*, Milwaukee J. Sentinel, Aug. 1, 2001 (noting that EEOC, even after dropping bridge-benefit cases, still had 102 pending early retirement program lawsuits against Wisconsin school districts).[15] School districts are still required to defend ADEA lawsuits brought against them for early retirement plans. The NSBA urges the Court to consider the importance of necessary and reasonable early retirement programs as a method for school districts to ensure that their workforces are staffed by teachers with the necessary skills for success in the classroom.

E. Districts Facing Budgetary Constraints May Require Reductions in Force.

School districts across the country regularly face circumstances that require them to reduce the size of their workforces. These reductions in force (RIFs) overwhelmingly occur when school districts experience difficult financial circumstances.

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[15] Indeed, NSBA's ongoing concern about the viability of school district early retirement programs led it to file an *amicus* brief in *Kentucky Retirement Systems* v. *EEOC*, 126 S. Ct. 36 (2007) (No. 06-1037), also before the Court this Term.

News reports indicate that at least 50 school districts nationwide have conducted RIFs in the last three years alone. The RIFs cut across employment categories, hitting not only teachers, but also classroom support staff, administrators, and physical plant staff. The number of school district employees subject to RIFs varied depending on the district, ranging from as few as five or 10 employees to as many as hundreds. *Compare* Kris Sherman, *Budget OK for Tacoma Schools*, Tacoma News Trib., Apr. 27, 2007 (reporting six teachers laid off in RIF) *with* Marie Leech, *Classrooms Hit Hardest by Employee Cuts*, Birmingham News, May 5, 2007 (reporting 398 employees, in a variety of positions, laid off in RIF).

An increased number of RIFs are a certainty in the coming years. School districts across the country will struggle with the financial repercussions of sharp declines in local housing markets, which will affect the state and local revenues available for educational funding. *See* Zuckerbrod, *School Officials Expecting Cuts Due to Downturn in Economy*, San Diego Union Trib., Feb. 11, 2008. Some effects are already being felt. In California, Governor Schwarzenegger has called for four billion dollars in cuts to the state education budget, leading school districts to send notices of potential layoffs to more than 10,100 teachers statewide. Jill Tucker, *Layoff Notices Set to Hit Teachers' Mailboxes*, S.F. Chron., Mar. 14, 2008.

Fluctuations in enrollment can also lead to RIFs. When enrollment decreases overall, and demand for educational services drops, it is hard for school districts to justify the same number of district employees. Even when overall demand for educational services within a district remains constant, however, shifts in demand within the district can still lead to RIFs. For example, a district may enroll a particularly large number of elementary school students at

a given point in time. Absent drastic changes in a district, those students will move *en masse* through the school system, changing the school system's staffing needs as they go. In the early years, the school district will need more highly-qualified elementary school teachers; in later years the district will need more highly-qualified middle and high school teachers. Under NCLB, those two sets of teachers, and their skills, are not fungible, 20 U.S.C. § 7801(23)(B), and teachers cannot be shifted seamlessly from one level to another. At a certain point, as the particularly large group of students moves into middle and high school, the school district may need to conduct RIFs among elementary school teachers, even while hiring new middle and high school teachers.

2. In districts with traditional collective bargaining agreements in place, RIFs like these fall more heavily on younger workers because traditional collective bargaining agreement seniority rules include a "last hired, first fired" system that favors older workers. However, almost a third of the states nationwide are not union states. Additionally, RIFs often affect both union and non-union positions. When RIFs occur in non-union school districts, or cover non-union positions, they may disproportionately affect older workers. *See, e.g., Mize* v. *Sch. Bd. of Polk County*, 10 F. Supp. 2d 1314 (M.D. Fla. 1998) (vocational school teacher laid off in RIF brought suit under ADEA). In such situations, older displaced employees have sued school districts under the ADEA. The government has also intervened on their behalf. *See EEOC* v. *Dist. of Columbia Pub. Schs.*, 277 F. Supp. 2d 44 (D.D.C. 2003) (EEOC brought suit on behalf of 62-year-old social studies teacher terminated in RIF); *EEOC* v. *Dist. of Columbia Pub. Schs.*, 217 F.R.D. 12 (D.D.C. 2003) (EEOC brought suit on behalf of 67-year-old terminated in RIF). School districts that conduct RIFs are, almost *ipso facto*, facing difficult

budgetary constraints. When those districts have made necessary and reasonable financial decisions about what is best for the district as a whole, they should not have to use limited available funds to meet additional legal burdens in lawsuits from disgruntled employees.

III. CHANGING THE BURDEN OF PROOF FOR EMPLOYERS IN DISPARATE IMPACT CASES WILL MAKE IT MORE DIFFICULT FOR SCHOOL DISTRICTS TO MEET TODAY'S EDUCATIONAL CHALLENGES.

The Second Circuit correctly ruled below that, in ADEA disparate-impact cases, an employer can defeat a plaintiff's prima facie case by adducing evidence suggesting that its employment decisions are based on routinely used age-neutral employment criteria, and that the ultimate burden of persuading the fact finder that the employer's purposes are unreasonable remains with the plaintiff. As the Second Circuit noted, "[i]t would seem redundant to place on an employer the burden of demonstrating that routine and otherwise unexceptionable employment criteria are reasonable." *Meacham* v. *Knolls Atomic Power Laboratory*, 461 F.3d 134, 142 (2d Cir. 2006).

Such a redundant requirement would have particularly serious adverse effects on public school districts. The need to prove the business necessity or reasonableness of all of the various types of common and essential school-district employment practices, examples of which are discussed above, because they might have a disparate impact on older workers would impose significant additional costs on school districts. Given the intense educational challenges embraced by school districts today, they should not also be forced to make personnel decisions based on the potential for a later ADEA lawsuit, rather than on the best interests of their students.

For example, when staff cut backs are required for legitimate non-discriminatory reasons, school district administrators would incur significant inefficiency and delay if they had to weigh each and every alternative to determine which would have the least impact on older employees. The Second Circuit recognized this dilemma when, referring to *Smith* v. *City of Jackson, Miss.*, 544 U.S. 228 (2005), it observed that "[t]o draw a negative inference from the *ex post* age distribution of laid-off employees would inhibit reliance on reasonable and useful employment criteria that are highly correlated with age." *Meacham*, 461 F.3d at 145.

The Second Circuit's rationale is particularly compelling in the context of actions by a school district. The resources of school districts, many of which are relatively small, are far from limitless. While for-profit employers may be able to calculate litigation costs and expenses into yearly budgets, school districts are governmental institutions supported by local tax dollars for which litigation—and especially litigation over reasonable hiring and retention decisions—can be an unexpected, and unbudgeted expense. Any additional costs for public schools necessarily must come out of a school district's taxpayer-funded budget at the expense of educational services for children.

Congress included the RFOA factor in the ADEA because it realized that there are reasonable policies, including those discussed herein, that may affect older employees disproportionately. These policies are not based on stereotypes about age, but rather serve other important interests. Indeed, in the school context, as noted above, some such policies may be based on the skills obtained by teachers through their years of experience and the need for those unique abilities possessed by particular teachers.

In sum, for school districts, even more than other employers, many "employment criteria that are routinely used may be reasonable despite their adverse impact on older workers as a group." *Meacham*, 461 F.3d at 145 (*quoting City of Jackson*, 544 U.S. at 240–42). School districts have a compelling interest in providing a quality education for students throughout the United States, and that interest, rather than any stereotypes about age, drives the various employment practices discussed above. [16]

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[16] Plaintiffs are well able to bear the judicial burden of challenging the reasonableness of a school district's employment decisions. The relative resources of the parties have nothing to do with the burden of proof—as the Fourth Circuit put it, "[w]e do not automatically assign the burden of proof to the side with the bigger guns." *Wenst* v. *Schaffer* ex rel. *Schaffer*, 377 F.3d 449, 453 (4th Cir. 2004), *aff'd* 546 U.S. 49 (2005). For example, parties challenging actions of the federal government bear the ordinary burden of proof despite the resources at the government's disposal. *See* 5 U.S.C. § 556(d). Just because an employer may appear to be more powerful and larger than a single employee, the employer should not automatically be forced to bear the burden of proof for RFOA.

CONCLUSION

For these reasons, NSBA respectfully suggests that the Court affirm the Second Circuit's decision.

Respectfully submitted,

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